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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Appellants,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees.*

On Appeal From the United States District Court for the Northern District of Illinois, Eastern Division

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JURISDICTIONAL STATEMENT

Appellants, American Trucking Associations, Inc.; National Motor Freight Traffic Association, Inc.; Regular Common Carrier Conference; Common Carrier Conference-Irregular Route; National Tank Truck Carriers, Inc.; Central and Southern Motor Freight Tariff Association, Inc.; Central States Motor Freight Bureau; The Eastern Central Motor Carriers Association, Inc.; Eastern Tank Truck Carriers, Inc.; Indiana Motor Rate & Tariff Bureau; Middle Atlantic Conference; Middlewest Motor Freight Bureau; The New England Motor Rate Bureau; Niagara Frontier Tariff Bureau, Inc.; Pacific Inland

Tariff Bureau, Inc.; Rocky Mountain Motor Tariff Bureau, Inc.; Southern Motor Carriers Rate Conference; Southwestern Motor Freight Bureau, Inc.; Cooper-Jarrett, Inc.; Eastern Motor Dispatch, Inc.; Kramer Bros. Freight Lines, Inc.; and Eastern Express, Inc., appeal from the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, entered on August 20, 1965, reversing in part a report and order of the Interstate Commerce Commission, dated March 16 and served April 3, 1964, to the extent that the Commission concluded that motor and water common and contract carriers may utilize trailer-on-flatcar (TOFC) service in performing all or any portion of their authorized service through the use of open-tariff rates published by rail carriers, and prescribed rules governing such use. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District Court is reported at 244 F. Supp. 955 (adv. sheets), and copies of the opinion and judgment are attached hereto as Appendix A. A copy of the Interstate Commerce Commission's report and order in *Substituted Service—Piggyback*, 322 I.C.C. 301, is attached hereto as Appendix C. In that Appendix and in references herein, the pagination of the official Commission report is used.

JURISDICTION

This suit was brought under 28 U.S.C. § 1336 to enjoin and set aside in part the report and order of the Commission. (Appendix C) The judgment of the District Court was entered on August 20, 1965, and notice of appeal was filed in that court on October 15, 1965. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Sections 1253 and 2101

(b) of the Judicial Code, 28 U.S.C. §§ 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States* v. *Drum*, 368 U.S. 370 (1962); *American Trucking Associations, Inc.* v. *United States*, 364 U.S. 1 (1960); *Frozen Food Express, Inc.* v. *United States*, 351 U.S. 40 (1956).

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceeding §§ 1, 301, 901 and 1001; and Sections 2, 3(1) and 216(c) of the Interstate Commerce Act, 49 U.S.C. §§ 2, 3(1), 316(c), are set forth verbatim in Appendix B hereto.

QUESTIONS PRESENTED

1. Did the District Court err in holding that Rules 2 and 3, and Rule 5 insofar as it relates to open-tariff TOFC service, prescribed by the Interstate Commerce Commission in Ex Parte 230, *Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, are not authorized by Sections 2 and 3 of the Act?

2. Did the District Court err in holding that Rules 2 and 3, and Rule 5 insofar as it relates to open-tariff TOFC service, violate the provisions of Section 216(c) and Part IV of the Act, respectively?

3. Did the District Court err in setting aside the Commission report and order insofar as it prescribed Rules 2 and 3?

STATEMENT

On June 29, 1962, the Interstate Commerce Commission, on its own motion, issued a notice of proposed rulemaking instituting an investigation into trailer-on-flatcar

or piggyback service. The stated purposes of the investigation were:

> ". . . ascertaining and determining, in the light of the national transportation policy, and the provisions of the Interstate Commerce Act, the desirability, feasibility, and lawfulness of the operational practices, services, and facilities provided and utilized by or for rail, motor, and water carriers, express companies and freight forwarders subject to the Act, and of encouraging the participation in and the expansion of coordinated service by all such carriers, and of taking such other and further action as the facts and circumstances may justify or require."

The notice listed certain specific issues, among others, to be considered and determined, and named all railroads, motor carriers, water carriers, express companies, and freight forwarders of property operating in interstate or foreign commerce, subject to the Interstate Commerce Act, as respondents. A pre-hearing conference was held October 9, 1962, at which proposed rules (reproduced at 322 I.C.C. pp. 406-10, Appendix C hereto) were distributed. No oral hearings were held, but opportunity was given to all parties to file representations, verified statements, and reply statements, which numerous parties did.

In a report and recommended order served August 23, 1963, two hearing examiners proposed the adoption of certain rules (reproduced at 322 I.C.C. 410-13, Appendix C hereto). Exceptions and replies to exceptions were filed and the Commission heard oral argument. The report and order of the Commission was filed March 16 and served April 3, 1964. (322 I.C.C. 301, Appendix C hereto) In its report and order, the Commission promulgated eight rules intended to regulate trailer-on-flatcar service. (322 I.C.C. 413-16; 49 C.F.R. 500.1 to 500.8) For convenience, the rules were referred to simply as Rules 1 through 8 in the District Court's opinion and will be so designated here.

On complaint, the District Court set aside the Commission's report and order insofar as it prescribed Rules 2 and 3, the "open-tariff" rules, and entered its judgment on August 20, 1965.

THE QUESTIONS ARE SUBSTANTIAL

1. As a preliminary matter, it is important to place this controversy in its factual context. Although the idea of transporting loaded highway vehicles on railroad flatcars is not new, the actual use of this combination of railroad-highway service was sporadic and relatively insignificant in our national transportation system until the latter half of the 1950's. Since approximately 1955, the expansion of this combination service has exceeded anything seen in transportation before. The opinion of the majority of the Commission described the growth of TOFC service in the five years proceeding the report as "explosive" (322 I.C.C. at 305); the dissenting Commissioner referred to piggybacking as "the brightest star in the transportation firmament." (322 I.C.C. at 386) The report (322 I.C.C. at 307-309) cites various statistics indicating the rapid growth of trailer-on-flatcar service, which are summarized as follows:

> "In 1957 a total of 57 class I railroads were participating in TOFC tariffs; in mid-1963, there were 100 class I railroads doing so. In 1955, 32 railroads reported a total of 168,150 TOFC carloadings for a weekly average of 3,234. In 1959, 50 reporting railroads showed totals of 415,156 annual and 7,984 weekly average carloadings for TOFC. For 1963, 63 reporting railroads indicated continued growth to approximately 797,500 TOFC cars, a weekly rate of approximately 12,700 loadings."

There is nothing in the report to suggest a diminishing of this growth in the foreseeable future.

TOFC transportation has not suddenly flowered because of any dramatic infusion of new traffic into the transportation system. Its development has been at the expense of the other, conventional methods of transportation. The Commission recognized that TOFC service has benefited the railroads using it by diverting to them "a substantial volume of traffic that previously had been moving by other modes of transportation, private and for-hire." (322 I.C.C. at 307, 322).

Because the use of TOFC transportation has increased so dramatically and so recently, the instant proceeding is the first one in which the Commission has considered the entire scope of this combination of railroad-motor service on a factual record. The only prior consideration given by the Commission to the entire field of TOFC transportation, *Movement of Highway Trailers by Rail*, 293 I.C.C. 93 (1954), was a decision rendered without a factual record. For this reason, the Commission noted that one of the purposes of the instant investigation was a re-examination of the pronouncements of prior decisions in the light of modern developments. (322 I.C.C. at 322) Recognizing also that the development of TOFC transportation is not at a standstill, the Commission noted that what it has done in the prescribed rules will not be the final and definitive word on all of the ramifications of piggyback service and indicated its readiness to review the effect of these rules in practice so that "the flexible development and free use of TOFC service" may continue. (322 I.C.C. at 325)

TOFC service has developed in terms of 5 different "plans" of service, although there have been many offshoots and modifications of these plans. For the convenience of the Court, these are described below: [1]

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[1] The five basic plans as set out in the Commission's report. (322 I.C.C. at 304-305)

Plan I. Railroad movement of trailers or containers of motor common carriers, with the shipment moving on one bill of lading and billing being done by the trucker. Traffic moves under rates in regular motor carrier tariffs.

Plan II. Railroad performs its own door-to-door service, moving its own trailers or containers on flatcars under tariffs usually similar to those of truckers.

Plan III. Ramp-to-ramp rates based on a flat charge, regardless of the contents of trailers or containers, usually owned or leased by freight forwarders or shippers. No pickup or delivery is performed by the railroad.

Plan IV. Shipper or forwarder furnishes a trailer or container-loaded flatcar, either owned or leased. The railroad makes a flat charge for loaded or empty-car movement, furnishing only power and rails.

Plan V. Traffic moves generally under joint railroad-truck or other combination of coordinated service rates. Either mode may solicit traffic for through movement.

The primary issue before the District Court and the primary issue on this appeal is the lawfulness of Rules 2 and 3, the so-called "open-tariff" rules, promulgated by the Commission.[2] Rules 2, which does not mention motor

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[2] The text of Rules 2 and 3(a) (the essential portion) is as follows:

500.2 *Availability to all of TOFC service.*—TOFC service, if offered by a rail carrier through its open tariff publications, shall be made available to any person at a charge no greater and no less than that received from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

500.3 *Use of open-tariff TOFC service by motor and water carriers in the performance of economically regulated transportation.*—(a) Except as otherwise may be prohibited by these rules, motor common and contract carriers, water common and contract carriers and freight forwarders may utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier.

or water carriers, is nothing more than a statement of the common-carrier obligation of rail carriers as it relates to trailer-on-flatcar service. Rule 3, briefly stated, provides that motor and water common and contract carriers and freight forwarders may utilize trailer-on-flatcar service in the performance of their authorized service under open-tariff railroad rates.

The Court below concluded that both rules must fall because under the Interstate Commerce Act, railroads may exclude motor carriers[3] from the public they are required, as common carriers, to serve, and because motor carriers are not authorized to use trailer-on-flatcar service without the railroads' consent. The Court also held that the rules must be rejected because of conflict with part IV, the freight forwarder provisions of the Act, an argument we will deal with below. In reaching its conclusion that the "open-tariff" rules are not authorized, but rather are prohibited by the Interstate Commerce Act, the District Court failed to recognize and give consideration to the basic premise underlying the Commission's decision. As a result, the Court's decision does not come to grips with the fundamental problem which the Commission sought to deal with in its prescription of Rules 2 and 3.

2. The Commission's attempt to regulate the relationship between rail and motor carriers in the utilization of trailer-on-flatcar service was based on the recognition that *all* trailer-on-flatcar service is inherently bimodal in that its basic characteristic is the wedding of the inherent advantages of both rail and motor transportation. It combines the railroads' ability to provide efficient line-

[3] Rule 3 also covers the use of open-tariff TOFC rates by common and contract water carriers, as well as freight forwarders. However, since the issues as to motor and water carrier use of open-tariff rates are largely identical, we will adopt the convention of the District Court of specifically referring only to motor carriers.

haul transportation of huge volumes of freight over long distances at high speeds with the motor carriers' ability to provide door-to-door, and even job- and farm-site, pick-up and delivery. (322 I.C.C. at 329)[4] The highway trailer is the key to the success of the trailer-on-flatcar service because trailer-on-flatcar transportation does not begin and end at the railroad ramps. The freight must be transported from the shipper to the consignee and, in trailer-on-flatcar service, this means that the freight-laden trailer must be transported partly on a flatcar over steel rails and partly over the streets and highways drawn by a highway power unit. It is the ability to perform this door-to-door movement in the same vehicle without reloading which has produced the phenomenal growth of this service. Without it, the economy and efficiency of long-distance volume movement by railroad are dissipated by the necessary time and expense of terminal handling and transfer between train and highway vehicle.

The lower Court failed to recognize the inherent bimodal nature of trailer-on-flatcar service when it considered the question:

> "whether the motor carriers could lawfully avail themselves of that service without violating their contracts with customers or exceeding the rights conferred by the certificate of public convenience and necessity which authorizes their operations." (Appendix A, p. 40)

The Court referred to the compartmentalization of transportation under separate formal parts of the Act and

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[4] The Commission noted that TOFC service may even be viewed as *trimodal*, in that it also employs the ability to consolidate many small shipments in a type of container service, a type of service which has become associated with freight forwarders. (322 I.C.C. at 329-30) While the consolidation of small shipments into volume lots for transportation is an identifying characteristic of freight-forwarding, it is not unique to forwarding since motor carriers have been consolidating small lot shipments since long before forwarders were given legislative recognition.

sought to deal with trailer-on-flatcar service in terms of these rigid modal divisions. (Appendix A, p. 41) It treated trailer-on-flatcar service as a rail service which Rules 2 and 3 would "require" the railroads to offer to motor carriers. (Appendix A, pp. 29, 51). The Court's view of trailer-on-flatcar service in the context of the transportation law is summarized by its reference to "the underlying statutory scheme that limits the carrier in each mode to transportation within and by that mode, absent special exception." (Appendix A, p. 41)

Trailer-on-flatcar service, being essentially bimodal, is not an exclusive rail service or an exclusive motor service, and it cannot be shaped to fit the measure of any one part of the Act. In trailer-on-flatcar service, the clear distinction between the inherent advantages of the various modes has been eliminated and a combination rail-motor service has sprung up. This coordination of the motor and railroad inherent advantages is an established fact. It is late in the day to turn back the clock, even if the desire to do so were present. The dual advantages of this bimodal service are today being exploited by the rail carriers, not just to serve traffic now being transported in other rail service, but to capture "a substantial volume of traffic that previously had been moving by other modes of transportation, private and for-hire." (322 I.C.C. 307, 322)

It is no more anomolous to permit motor carriers to utilize this bimodal service than it is to permit railroads to do so. The lower Court said that the certificate issued to a motor carrier "authorizes the holder to engage in for-hire transportation by 'motor vehicle', not by rail or other modes, and on the 'public highways'." (Appendix A, p. 41) By the same token, railroads are authorized to engage in for-hire transportation by "railroad," not by motor vehicle or other modes, but when a railroad engages in trailer-on-flatcar service, utilizing a highway vehicle to achieve a door-to-door movement without the transfer of

the lading, it is not confining itself to "railroad transportation."

If technological development is to be ignored and railroads and motor carriers are to be strictly confined to historical pre-piggyback concepts of discrete modal operations, then there is no place in the transportation system for trailer-on-flatcar service. This is the real fault of the decision below: by insisting that transportation development must conform to the framework of the law, rather than permitting the Commission to implement the law to meet developing transportation needs, the District Court would preclude any adaptation or innovation in transportation technology. The whole purpose of Congress in creating administrative agencies was to permit flexibility in the adaptation of regulation to meet the needs of a developing society and commerce.

The lower Court's view of trailer-on-flatcar service as essentially a rail service led it to conclude that the open-tariff rules also conflict with the permissive aspects of Section 216(c), 49 U.S.C. § 316(c), relating to through-routes and joint rates. Viewing this service as a rail service, it concluded that motor carrier use of it would be "shipment by other modes," which is only authorized under Section 216(c) and only on a voluntary basis. (Appendix A, p. 41) The Court below assumed that the provision by a motor carrier of trailer-on-flatcar service utilizing in part a rail movement under an open-tariff rate results in a *de facto* through route. (Appendix A, p. 42)

A through route has been defined as "a continuous line of railway formed by an arrangement, express or implied, between connecting carriers." *Through Routes and Through Rates*, 12 I.C.C. 163, 166 (1907) This Court stated it in slightly different form in *Thompson* v. *United States*, 343 U.S. 549, 556 (1952), and *St. Louis Southwestern R. Co.* v. *United States*, 245 U.S. 136, 139 (1917): "A 'through route' is an arrangement, express or implied,

between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another . . . ." When a motor carrier tenders a shipment under a rail open tariff, the railroad does not participate in offering a through transportation service. Its holding out and its bill of lading contract cover only the portion of the movement under the open-tariff provision. It has no contact with and is subject to no contractual or statutory liability to the original shipper. All that is involved under the open-tariff rules is the unilateral substitution by the motor carrier of a trailer-on-flatcar movement for a portion or all of the highway movement: the shipper's bill of lading contract is only with the motor carrier; and the service is that of the motor carrier. This does not meet the test of the existence of a through route stated in the *Thompson* case, *supra*, (at 343 U.S. 557): "whether the participating carriers hold themselves out as offering through transportation service."

The District Court assumed a through route and devoted its discussion to the question of "compulsion." (Appendix A, p. 42) As there is no through route involved, the question is not whether there is compulsion under Section 216(c), but whether a common carrier may be compelled to hold out its service to all of the public on equal terms or whether it may select only that segment of the public it chooses to serve. An open tariff, by definition, holds out a service to the public without qualification except that users must meet the lawful tariff requirements. By striking down Rule 2, which admittedly is substantially a paraphrase of Section 2, and Rule 3, which implements it as to motor carrier use of open-rail tariffs, the District Court has opened the door to common carrier selection of its patrons.

3. In looking to the Interstate Commerce Act for either specific authorization or specific condemnation of the

"open-tariff" rules, the District Court was also guided by its consideration of trailer-on-flatcar service as essentially a single-mode railroad service.

The second part of the question considered by the District Court was whether the Commission correctly construed the Act to forbid railroad discrimination against motor carriers in the services afforded or if the Act rather excuses the railroads from a duty to serve motor carriers equally with "ordinary shippers." (Appendix A, p. 34) It concluded that neither Section 2, 49 U.S.C. § 2, discussed in the Commission report, nor Section 3, 49 U.S.C. § 3, affirmatively authorizes the open-tariff rules. In its persistence in treating this matter as a modal contest, the District Court seemingly went too far, because it declared unlawful Rule 2 which requires railroads to carry for all on equal terms and without discrimination under their open-tariff TOFC publications. The court below acknowledged that "in considerable part the Commission's Rule 2 is merely a paraphrase of" Section 2 (Appendix A, p. 35), but because of the juxtaposition of Rules 2 and 3 and their logical connection, the District Court apparently felt constrained to declare Rule 2 unlawful.

Because railroads are common carriers under a duty to serve all of the public on equal terms—a concept which permeates the Act[5]—there is no need to find support for Rules 2 and 3 in the explicit command of any single section of the Act. Rather, the burden is on the carriers claiming the right to discriminate against certain segments of the public in derogation of that duty, to point to the specific statutory exemption from their common-carrier duty to serve.

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[5] E.g., section 1(4) requires common carriers to provide and furnish service upon reasonable request; section 2 prohibits unjust discrimination; section 3(1) prohibits undue preference or prejudice, etc.

In another proceeding involving the claimed right of a common carrier to discriminate in its holding out to the public, *Interstate Commerce Commission* v. *Delaware, L. & W.R. Co.*, 220 U.S. 235 (1911), this Court noted the common-carrier duty to serve (at page 252):

> "The contention that a carrier, when goods are tendered to him for transportation, can make the mere ownership of the goods the test of the duty to carry, or, what is equivalent, may discriminate in fixing the charge for carriage, not upon any difference inhering in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods, is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of shippers, as to demonstrate the unsoundness of the proposition by its mere statement. We say this because it is impossible to conceive of any rational theory by which such a right could be justified consistently whether with the duty of the carrier to transport or of the right of a shipper to demand transportation. This must be, since nothing in the duties of a common carrier by the remotest implication can be held to imply the power to sit in judgment on the title of the prospective shipper who has tendered goods for transportation."

This was the approach taken by the Commission. It stated that the proposed rules (322 I.C.C. at 406 et seq.) were framed to achieve the end "that TOFC service be made available to all at equal charges." (322 I.C.C. at 328) While it agreed with the examiners that proposed rules in this regard should not be published because they would have the effect of controlling by general rule the divisions of revenue which should be left, at least initially, to private negotiation, nevertheless, the Commission was "still concerned with the concept of equal TOFC charges for all underlying the proposed rules." (322 I.C.C. at 328) It therefore determined to publish a basic rule

embodying that concept and a rule which relates that concept of equal charges to motor carrier use of open-tariff rates.

The District Court concluded that the Commission was resting its prescription of Rules 2 and 3 on Section 2 of the Act, which was discussed in the Commission report. (Appendix A, p. 35) This resulted from a consideration of only that section of the report treating Rules 2 and 3. Because of the size and scope of the investigation and the necessary length of its report, the Commission discussed different aspects of the regulation of trailer-on-flatcar transportation, and the rules relating to those aspects, in different sections of the report. It did not set out, in each section, the statutory authority for the particular rules discussed in that section.[6] The statutory authority for all of the prescribed rules is set out in 322 I.C.C. at 324. Referring specifically to rules "to implement the broad provisions of existing legislation"—of which the open-tariff rules are prime examples—the Commission specifically relied on its broad rule-making power and the provision of section 12 wherein it is "authorized and directed to execute and enforce" the provisions of Part I of the Act. It noted past judicial recognition of this rule-making authority, citing *Assigned Car Cases*, 274 U.S. 564, 575 et seq. (1927); *American Trucking Assns.* v. *United States*, 344 U.S. 298, 308-13 (1953); and *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612, 616 (1945); in the last of which it noted that this Court pointed out that the Act since its inception—

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[6] E.g., at 322 I.C.C. 372-80, the Commission discusses the prescription of "billing and notification" rules without referring to specific statutory authority to do so; and at 322 I.C.C. 367-72, it discusses the prescription of the tariff publication rules without citing specific statutory authority for such rules. In rejecting the attack on the tariff publishing rule (Rule 7), the court below found support for it in Sections 6(1) and 1(3)(a) of the Act.

> "has contained broad language to indicate the scope of the law. The very complexities of the subject have necessarily caused Congress to cast its regulatory provisions in general terms. Congress has, in general, left the contents of those terms to be spelled out in particular cases by administrative and judicial action, and in the light of the Congressional purpose to foster an efficient and fair national transportation system."

The Commission discussed various provisions of the Act[7] as well as a line of prior decisions which various parties claimed were in conflict with the open-tariff rules (322 I.C.C. at 329-36), but this discussion was directed to answering specific arguments on exceptions, it was not designed to set out specific statutory justification for the rules.

The District Court, on the other hand, looked for specific statutory language as support for the rules in either Section 2 or Section 3(1). In doing so, however, the court failed to note the full scope of the rules:

> ". . . the ostensible object and effect of those Rules [Rules 2 and 3] is not to eliminate discrimination in rates under Section 2, but rather to compel the railroads to afford TOFC service to motor carriers if it is provided for others. The provision relevant to this purpose, Section 3, is nowhere cited in the Commission Report." (Appendix A, p. 36)

The Court did note that Sections 2 and 3 are complementary and to be read in *pari materia*, but it did not note that they must also be read in the context of other provisions of the Act relating to the common carrier obligation, nor did it recognize that Rules 2 and 3 do more than

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[7] The provision in the national transportation policy for "fair and impartial regulation of all modes of transportation" (322 I.C.C. 329); the through-route provision of Section 216(c) (322 I.C.C. at 334-35); the non-discrimination provisions of Section 2. (322 I.C.C. at 335-36)

"to compel the railroads to afford TOFC service to motor carriers if it is provided for others." They are designed to eliminate discrimination in both rates and service. Rule 2 says not only that all may utilize trailer-on-flatcar service, but that they may use it at the same charge for substantially the same service.

This Court has also recognized the close interrelation between the duty to carry and non-discrimination in charges in *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.*, *supra*, 220 U.S. 235, 252 (1911). Likewise in *Wight* v. *United States*, 167 U.S. 512, 517 (1897), the Court described Section 2 of the Act as "designed to compel every carrier to give equal rights to all shippers over its own road, and to forbid it by any device to enforce higher charges against one than another." The argument that differential pricing between different shippers for the same service may be forbidden by Section 2, but that refusal to allow certain shippers to use published tariff rates is not, was answered by the Commission in the first year of the Interstate Commerce Act in *Smith* v. *Northern Pacific R. Co.*, 1 I.C.C. 208, 212 (1887). There the railroad sold tickets to prospective land purchasers not available to the public at large. The Commission found: "This course of dealing is in direct contravention of the second section of the Act to Regulate Commerce." And in *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, 111 (1954), the Commission held that a railroad may not, by a tariff provision, make its trailer-on-flatcar service available to private carriers but not to freight forwarders since this Court had held (in *Delaware L. & W.R. Co.* case, *supra*) "that a railroad may not make the ownership of goods tendered to it for carriage the test of its duty to receive and carry." Rate discrimination and service discrimination are but two faces of the same evil. It is small comfort to a shipper barred from using a common-carrier transportation service available to others

to know that his exclusion results from a flat refusal of service rather than from the rate being discriminatorily set so high as to him as to bar its utilization.

Contrary to the conclusion of the District Court, Section 2 of the Act does support the prescription of the open-tariff rules as they are designed to prevent rate discrimination between persons, etc., utilizing trailer-on-flatcar service under substantially similar circumstances and conditions. Likewise, Section 3 of the Act which prohibits undue or unreasonable preference or prejudice also supports the open-tariff rules. The District Court rejected Section 3 as support for the rules because of the proviso excluding from its coverage "discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description." (Appendix A, p. 36) It rejected the legislative history of this proviso, adopted in 1940, which shows that it was intended to safeguard the *rates* of other carriers against claims that they were unduly prejudicial to the traffic of the rail carrier. The section 3(1) proviso was based on a similar proviso in section 216(d) of the Act, 49 U.S.C. § 316(d), enacted in 1935. In discussing the purpose of the proviso language, Senator Wheeler said:

> "Paragraph (b) . . . prohibits unjust discrimination or undue prejudice or disadvantage. The Committee has added a provision that this prohibition shall not be construed to apply to the traffic of any other carrier of whatever description.
>
> "In other words, some of the truck and bus operators were afraid that the railroads would come in and complain, and we added this provision so as doubly to protect the truck and bus operators.
>
> "This provision is added to meet the objection of certain interests that the original paragraph might have been construed so as to make it unlawful for a motor carrier to charge a rate which would place a

> rail carrier or any other carrier at a disadvantage. *This contention is not well founded in our judgment inasmuch as the provisions of this paragraph are substantially the same as those in section 3(1) of the Interstate Commerce Act, which has been in effect since 1887, and have always been interpreted as covering unequal and unjust treatment by a carrier of its patrons.* However, as I said, to make assurance double sure, this provision was added." 79 Cong. Rec. 5656 (Emphasis supplied).[8]

Despite the clear statement of the purpose of the proviso in Senator Wheeler's explanation, the District Court found the legislative material inconclusive, in part, at least, because of its unwillingness to include carriers in the term "patrons" used in those remarks. (Appendix A, p. 37) From the nature of the remarks, it is apparent that Senator Wheeler used the term "patrons" as a shorthand designation of those within the protection of Section 3(1): "person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic." The term "person" is defined in Sections 1(3)(a), 203(a)(1), 302(a), and 402(a)(1) in substantially similar terms and neither expressly nor by implication are carriers excluded.[9]

As support for its conclusion that the open-tariff rules are not authorized by the affirmative commands of Sections 2 and 3 of the Act, the District Court pointed to certain "anomalies" which would arise under Section 2. (Appendix A, p. 37) The first of these is that the rules

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[8] See also, Oppenheim, The National Transportation Policy and Inter-Carrier Competitive Rates, 50-51, 58-59 (1945), and legislative material cited therein.

[9] The use of the phrase "a person which is not a carrier" at places in the Act—e.g., in section 5(2)(a) and (3)—indicates that except as excluded expressly or by necessary implication, "carrier" is included in the term, "person".

are not limited to plan III trailer-on-flatcar service, or even to trailer-on-flatcar service and that "a motor carrier in using it would abandon any pretense of performing service as a carrier . . . ." (Appendix A, p. 38) Of course, the Commission has the power to control abuses under the Act, including the failure of common carriers by motor vehicle to render continuous and adequate service as required in Section 204(a)(1) of the Act, 49 U.S.C. § 304(a)(1), and in the individual certificates of public convenience and necessity, and under Section 212(a), 49 U.S.C. § 312(a) it has the power to suspend, change, or revoke certificates, under appropriate procedure, for failure to comply with the provisions of the Act, the Commission's orders, rules, and regulations, or terms or conditions of certificates. In its decision here, the Commission specifically noted that the prescribed rules are not the "final and definitive word" and left open the door to future modification of the rules as found necessary. (322 I.C.C. 325) The remote possible abuses forecast by the lower court are effectively guarded against and do not support the rejection of Rules 2 and 3.

The other "anomalies" suggested by the lower court (Appendix A, p. 39) result from its failure to distinguish between a person (including a carrier) using trailer-on-flatcar service under an open tariff and a rail and motor carrier joining together to offer a joint service. These are not services "under substantially similar circumstances and conditions," as required for the anti-discrimination provisions of Sections 2 and 3 to come into play. The divisions between carriers participating in joint service have no relation to the rates and charges under open tariffs. Shippers cannot participate in joint-service divisions, not because of anything in Rules 2 and 3, but because they are not carriers authorized under the Act to enter into joint-service arrangements.

Similarly, the "discrimination" against motor carriers in the limits on their use of open tariff service comes about because of the limitations in their certificates. They may only perform carrier service within the limits of their certificates and, therefore, they may only use open-tariff TOFC service in the performance of their authorized service within the limits of their certificates. This is a discrimination, but it is not an unjust, undue, or unreasonable discrimination which is what the Act forbids.

4. The third ground for rejection of the open tariff rules stated by the District Court is their supposed conflict with the freight forwarder provisions of part IV of the Act. (Appendix A, p. 45) The court's reasoning rests on the assumption that a motor carrier utilizing bimodal trailer-on-flatcar service is not operating as a motor carrier. Here, also, the unspoken assumption is that trailer-on-flatcar service is a rail service, an assumption we have dealt with above. Assembly and distribution of small-lot shipments are not uniquely attributes of freight forwarding (*supra*, n. 4), and as long as a motor carrier is performing such assembly and distribution *as a motor carrier*, he is excluded from the definition of "freight forwarder" in Section 402(a)(5) of the Act, 49 U.S.C. § 1002(a)(5).

The lower court's final ground for rejecting the open tariff rules is that a long line of past Commission decisions have proceeded on the premise that it is "repugnant to the act" for a motor carrier to act as a common carrier and a shipper as to the same service and what it frankly calls "legislative inaction." (Appendix A, p. 48) But the effect of such a holding would be either to force administrative agencies into an undesirable rigidity or to make them reluctant to act for fear that future changes in circumstances would call for a then unlawful modification of prior holdings. The whole justification for the

establishment of administrative agencies is to permit a development of the law to meet new circumstances. Congress has cast the regulatory provisions in general terms and left it to the agencies to spell out the contents of those terms. *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612, 615 (1945). The Commission here was re-evaluating past decisions in the light of the recent spectacular growth of trailer-on-flatcar service and because those past decisions were rendered "during the infancy of this transportation prodigy." (322 I.C.C. 322) Unless agencies are free to respond to new developments when the need for regulation arises, they would fail to carry out the congressional purpose which is the justification for their being.

The Commission's decision here represents a commendable effort of an agency to act in response to a revolutionary development in the activities it is charged with regulating—a development which overturns many of the existing concepts in transportation. Trailer-on-flatcar service obliterates the historic lines of demarcation between modes of transportation, and permits the blending of the attributes of both rail and motor service. Faced with the question of the use of this new bimodal service in *Movement of Highway Trailers by Rail*, 293 I.C.C. 93 (1954), without a record of past operations and without any basis for forecasting the future impact of this rail-motor service, the Commission approved the railroad use of it. Through its exploitation, the railroads have been able to avoid the limitations inherent in conventional railroad operations and offer the shippers a service which is predicated upon the door-to-door movement of freight in the same highway vehicle—the primary inherent advantage of motor carriers. As a result the transportation services of railroads are no longer confined to the railroad tracks, but extend over the streets and highways to the doors of shippers and consignees.

As a result of the *Movement of Highway Trailers by Rail* decision, railroads have been able to bar motor carrier use of this bimodal service except at their sufferance. In this proceeding, with a record of the phenomenal growth of this hybrid rail-motor service, the Commission has re-evaluated prior decisions. That record shows that railroads have been able to invade to a substantial degree the traffic of motor carriers. In its decision here the Commission sought to give the motor carriers a *quid pro quo* for allowing the railroads to exploit the motor carrier inherent advantages. Its decision merely assures that this bimodal rail-motor service will be equally open to both railroads and motor carriers.

Under the decision of the court below, the motor carriers would be barred from participating in this bimodal rail-motor service except at the sufferance of the railroads. In freeing the motor carriers from this railroad veto of their use of trailer-on-flatcar service, the Commission was acting in accordance with the mandate of the national transportation policy to provide for the "fair and impartial regulation of all modes of transportation subject to [the] Act." (49 U.S.C., preceding §§ 1, 301, 901, and 1001).

CONCLUSION

The questions presented by this appeal are substantial and of public importance. For the reasons stated, we urge that jurisdiction be noted and that the judgment of the District Court be reversed and the case remanded to that court for disposition consistent with the Court's opinion.

Respectfully submitted,

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